88-1565

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1989

RICHARD ALAN LEEMIS,

Petitioner,

v.

HOSPITAL CORPORATION OF AMERICA (HCA),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Richard Alan Leemis,
Petitioner
1629 Kimbrough Road
Germantown TN 38138
(901) 757-0067

QUESTION PRESENTED

Whether Section 12 of the ADEA [29 U.S.C.§631(a)] is an absolute bar to District Court jurisdiction in cases where a Plaintiff is under the age of 40 years and where one or more of ADEA. Section 12 clauses (a)(3), (c)(3) or (d) [29 U.S.C. §623] have been alleged to have been violated or a legal subterfuge has been alleged to undermine the intent of the ADEA.

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Order affirmed O.D. 88-5595, Filed November 21, 1988, U. S. Court of Appeals for the Sixth Circuit

JURISDICTION

The judgement of the Court of Appeals was entered on November 21, 1988. The original filing date of this writ was February 21, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

It shall be unlawful for an employer to reduce the wage rate of any employee in order to comply with this Act. Section 4 (a)(3) of the ADEA [29 U.S.C. §623(a)(3)].

It shall be unlawful for a labor organization to cause or attempt to cause an employer to discriminate against an individual in violation of this section. Section 4 (c)(3) of the ADEA [29 U.S.C. §623(c)(3)].

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any

individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership, has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or litigation under this Act . Section 4(d) of the ADEA [29 U.S.C. §623(d)].

The prohibitions in this Act (except the provisions of section 4(g)) shall be limited to individuals who are at least 40 years of age. Section 12 of the ADEA {29 U.S.C. §631(a)].

STATEMENT OF THE CASE

On February 3, 1987, the Plaintiff, Richard A. Leemis, was terminated from his position at the Defendant, Hospital Corporation of America (HCA). On September 25, 1987, the Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission and The Tennessee Human Rights Commission. In this charge the Plaintiff alleged that his termination from HCA was part of a

cover up that was initiated by the Defendant to hide other alleged ADEA violations committed by the Defendant, HCA.

In January 29, 1988 the Plaintiff filed suit in the U. S. District Court for the District of Tennessee, Western Division. The complaint stated that the action was brought pursuant to the Age Discrimination in Employment Act Title 29 of the U. S. Code.

On February 23, 1988, the Defendant moved that the Court dismiss this suit on grounds that the complaint raised no federal question. On March 9, 1988, the Plaintiff amended his Complaint to more properly address the federal question involved. Judge McRae later allowed this amendment to the complaint. On March 24, 1988, the defense submitted a document that was not properly served upon the Plaintiff and contained an error in the quotation of the applicable statute. [ADEA Section 12 (29 U.S.C. §631(a)]. The word "provisions" was substituted for "prohibitions" thus changing the meaning of the critical statute. In spite of the Plaintiff's request for the mis-served pages, on April 8, 1988, the Honorable Robert M. McRae, Senior District Judge for the Western Division of Tennessee dismissed the Complaint for

lack of subject matter jurisdiction (See Appendix B). On the third page of this Order of Dismissal, Judge McRae stated:

> "...Defendant has provided a copy of the charge Plaintiff filed with the EEOC and the affidavit of Scott Hoffman, one of its officers, both of which indicate plaintiff was thirty-two years of age when he was discharged. The ADEA protects only those individuals who are at least forty years of age. [29 U.S.C. §631(a).]"

The plaintiff filed a Notice of Appeal on May 9, 1988. In his brief to the Sixth Circuit Court of Appeals, the Plaintiff-Appellant argues that:

> 1. The plain language of the ADEA [29 U.S.C. §621, et seq.] does not exclude all persons under 40 years from protection under the act. (p. 10-14).
>
> 2. Judicial precedent has allowed those under the age of 40 years limited protection under the ADEA statutes. Merkel v. Scoville, Inc., 787 F.2d 174 (6th Cir. 1986).
>
> 3. By dismissing the case the Plaintiff was prevented from presenting to the Court ample evidence that suggests that the real motive of the Defendant, HCA, was to create a subterfuge to the ADEA statutes. (pp. 21-25).

In its brief, the Defendant argues that:

> 1. "Section 631(a) ...grants standing ... only to individuals who are 40 years of age or older. " (p. 6).

2. "Since ... enactment ... the ADEA has been amended twice without modification of the minimum age requirement. That ... provides further evidence of the clear congressional intent to protect only persons 40 years of age and older." (p. 6).

3. The Plaintiff cannot "bootstrap" himself onto the rights of others for recovery under the Act. (The Plaintiff's) claim of age discrimination was therefore properly dismissed by the District Court..." (pp. 11-12).

In his reply brief the Plaintiff-Appellant counters by stating that:

1. The Defendant-Appellee has defended its position by making several misstatements of fact including misrepresenting the decision of the Court in Merkel v. Scoville, Inc. 787 F. 2d 174 (6th Cir. 1986) (pp. 2-3).

2. The Defendant continues to misrepresent the Plaintiffs complaint and EEOC charge. (p. 3-4).

3. The Defendant's challenge to the standing of the Plaintiff to sue under the ADEA is not substantiated and constitutes a sham argument. (p. 8).

The Sixth Circuit Court of Appeals issued an order on November 21, 1988, upholding the dismissal of the Plaintiff's Complaint. (See Appendix A). The court states:

After consideration of the record in light of the arguments contained in the brief s the Court concludes that the District Court did not err in dismissing Plaintiff's Complaint. (p. 2).

No further explanation of the Courts reasoning is provided.

REASONS FOR GRANTING THE WRIT

As in this case, lower courts have frequently, although not consistently, interpreted Section 12 of the ADEA [29 U.S.C. §631(a)] to control jurisdiction over all aspects of the ADEA. This interpretation is made in spite of clear language indicating the contrary in the legislation itself [29 U.S.C §623(a)(3), (c)(3), (d)].

Frequent reliance upon the standard established in McDonnell Douglas v. Green, 411 U.S. 793, 93 S.Ct. 1817, 36 L.Ed. 688 (1973), is often cited as authority. However, in Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-578, 98 S.Ct. 2943, 2940-50, 57, L.Ed. 2d 957 (1978), Justice Rehnquist wrote:

> "The method suggested in McDonnell Douglas for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic."

Much confusion on this issue exists. The Court needs to settle this issue in a manner consistent with the statute and with past appellate Court practice. In overturning a judgment

favorable to a 30 year old ADEA Plaintiff, Merkel, the Sixth Circuit found the age of the Plaintiff [573 F.Supp. 1055, 1058] unremarkable [787 F.2d 174 (6th Cir. 1986)]. This outcome is consistent with Justice Rehnquist's opinion in the Furnco case and is consistent with the legislative language.

The defendant, HCA, has misrepresented the Merkel v. Scoville, [787 F.2d 174 (6th Cir. 1986) decision in its appellate brief. (Brief of Appellee pp. 10-11). The Defendant maintains that the Plaintiff Merkel only sought recovery for retaliatory discharge, a state claim. Although the Defendant has refused to acknowledge the applicability of the Merkel decision, an individual under the age of 40 has been permitted to pursue a substantive claim of age discrimination under the ADEA.

The Plaintiff has alleged that the Defendant, HCA, created devices and engaged in subterfuges in order to undermine the ADEA.

The prevalence of this type of behavior was highlighted recently in an article titled, "Managements Red Herrings: Attempts to Circumvent the Age Discrimination in Employment Act" by Walter T. Champion, Jr. [50 Texas Bar Journal 506(4), May 1987].

> The Age Discrimination in Employment Act of 1967 (ADEA) was implemented "to encourage and protect the employment of older persons based on ability rather than age" and to prohibit arbitrary age employment discrimination.
>
> This noble Act, however, has recently been the victim of attempts by employers to circumvent its mission and purpose by the use of pretexts, shams and subterfuges. This is accomplished by company policies that appear fair-minded but are actually disingenous ploys to avoid the Act. Management has, in effect, created red herrings in their employment policies as a means to disregard the Act and thus pattern their hiring and firing procedures on illegal age based criteria. (Id., at 506) The red herrings here are management's contrived employment policies and practices that appear on the surface to be harmless, innocent, and rationally related to a legitimate goal. (Id., at 508).

The Plaintiff alleges that HCA used the tool of mass termination and paired termination to defeat the purposes of the ADEA. The Courts have intervened when it is necessary to prevent a transparent evasion of the Act. See Pfieffer v. Wm. Wrigley, Jr., Co., 755 F.2d 554 (7th Cir. 1985). This systematic cover-up has been alleged in every Plaintiff's document from the EEOC charge forward. The power of major corporations to defeat the purposes of the ADEA is overwhelming. The Defendant, with a staff of 89,000 employees, is able to bury individual cases of race, age and

sex discrimination in its annual restructuring, reorganization and "cutbacks." In spite of steady profits from operations, HCA is constantly in a state of "restructuring" or "reorganization." This continual state of uncertainty goes back to the 1970's or earlier. In spite of growing employment and growing profitability, HCA has made a corporate policy of engaging in mass termination. Months after termination when most of the terminated employees have quietly found their way back into the company the real target or targets of the purge become evident. The law firm of Ford and Harrison of Atlanta is consulted concerning strategy before every termination. Frequently terminations are paired such that a younger employee is terminated with an employee over age 40.

The Plaintiff believes that HCA and its legal counsel have been successful in using this strategy against its employees partially because of the perception in the legal community that no one under the age of 40 is protected by the ADEA. Clarification of the standard will help employees to better understand their rights and will prevent large corporations like the Defendant from using mass termination as a tool to defeat the ADEA.

The grant of a Motion to Dismiss pursuant to the Federal Rules of Civil Procedure 12 (b)(6)is appropriate only when:

> "... it appears beyond doubt that Plaintiff can prove no set of facts in support of [his] claims which would entitle [him] to relief. Conley v. Gibson, 355 U.S. 41, 45-46.

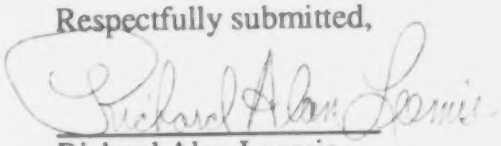
In ruling on a Motion to Dismiss, the Court must view the Complaint in the light most favorable to the Plaintiff and resolve every doubt on his behalf. See Jenkins v. McKeithen, 395 U.S., 411, 421-422 (1969).

The plaintiff has shown beyond doubt that it is possible for an individual under the age of 40 to pursue a substantive claim of age discrimination under the ADEA. The District Court failed to examine the motives of the Defendant in terminating Plaintiff and consequently did not resolve all issues before it. The civility upon which all law depends is being undermined by large corporations such as the Defendant and their legal council who consider the ADEA just another civil rights statute in need of an evasive litigation strategy.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Richard Alan Leemis
Plaintiff

APPENDIX A

No. 88-5595

UNITED STATES COURT OF APPEALS
OF THE SIXTH CIRCUIT

RICHARD ALAN LEEMIS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
HOSPITAL CORP. OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

BEFORE: ENGEL, Chief Judge, JONES, Circuit Judge; and THOMAS, Senior District Judge.*

This pro se plaintiff appeals a judgment of the district court which dismissed his cause of action based upon both the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and state contract and tort law. He now moves for leave to amend his complaint and for decision of the appeal on the basis of the briefs. Upon review of the record, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Plaintiff, Richard Alan Leemis, filed a complaint in the District Court for the Western District of Tennessee. As the

*The Honorable William K. Thomas, Senior U.S. Distrit Judge for the Northern Distrit of Ohio, sitting by designation.

basis of his claim for both compensatory and punitive damages, he alleged that defendant, Hospital Corporation of America, had illegally terminated his employment in violation of state contract and tort law and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. The district court, however, dismissed the complaint based upon the conclusion that plaintiff's cause of action under that statute was so clearly devoid of merit as to not invoke federal subject matter jurisdiction. Accordingly, the district court also determined that it no longer enjoyed pendent jurisdiction over plaintiff's remaining state law claims and therefore entered a judgment dismissing the complaint in its entirety. Plaintiff then filed this appeal.

After consideration of the record in light of the arguments contained in the briefs, the court concludes that the district court did not err in dismissing plaintiff's complaint. Accordingly, the motions for leave to amend the complaint and for decision of the appeal on the briefs are hereby denied and

the district court's final judgment is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/s Leonard Green
Clerk

MANDATE ISSUED: 12/14/88
COSTS TAXED: NONE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RICHARD ALAN LEEMIS,

Plaintiff,

VS. NO. 88-2071-4A

HOSPITAL CORPORATION OF AMERICA,

Defendant.

ORDER OF DISMISSAL

Presently before the Court are defendant's Motion to Dismiss and plaintiff's Motion to Amend the Complaint. Plaintiff, who is pro se, has submitted a response to the Motion to Dismiss. Defendant has replied to plaintiff's response, but has not yet filed an answer.

Addressing the Motion to Amend first, the Court notes that Rule 15(a) provides in pertinent part: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served...." A complaint may therefore be amended without leave of the Court at any time before an answer is served. 6 C. Wright & A. Miller, Federal

Practice and Procedure §1482, at 410. Accordingly, as no answer has been filed, plaintiff's amendment is allowed. See Butler v.McDonnell-Douglas Saudi Arabia Corp., 93 F.R.D. 384, 389 (S.D. Ohio 1981).

Defendant has moved to dismiss the complaint alleging subject matter jurisdiction is lacking. Plaintiff contends "federal question" jurisdiction exists. Both the original complaint and the amended complaint assert a claim based upon the Age Discrimination in Employment Act. ("ADEA "), 29 U.S.C. §621 et seq. Complaint ¶ 14; Amended Complaint ¶¶14, 37-46. Defendant does not seek dismissal under Rule 12(b)(6) for failure to state a claim, rather, defendant contends: "The matter in controversy herein, as shown by the allegations of the complaint, does not arise under the Constitution or any law or treaty of the United States." Memorandum in Support of Defendant's Motion to Dismiss Complaint at 1. Inexplicably, defendant's motion makes no mention of the ADEA allegation in the original complaint, although its reply does make the suggestion that plaintiff has no standing to bring an ADEA claim. Defendant's Reply to Plaintiff's

Memorandum in Response to Defendant's Motion to Dismiss Complaint at 2.

This Court clearly has subject-matter jurisdiction over a claim brought under the ADEA. See 29 U.S.C. § 626(c)(1). Plaintiff expressly cites the ADEA and contends he was discharged because of his age. Given the general rule that pro se complaints are to be liberally construed, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), this might be found sufficient to satisfy the jurisdictional pleading requirement of Rule 8(a)(1) despite the absence of any allegation that plaintiff's age places him in the protected class. However, defendant has provided a copy of the charge plaintiff filed with the EEOC and the affidavit of Scott Hoffman, one of its officers, both of which indicate plaintiff was thirty-two years of age when he was discharged. The ADEA protects only those individuals who are least forty years of age. 29 U.S.C. § 631(a).

If a claim upon which subject-matter jurisdiction is based is so "attenuated and unsubstantial as to be absolutely devoid of merit," Newburyport Water Co. v. Newburyport, 193 U. S. 561, 579 (1904), or "frivolous," Bell v. Hood, 327 U.S. 678, 683 (1946), dismissal of the complaint on the

ground of lack of subject-matter jurisdiction is warranted. Plaintiff's age places an inescapable barrier in the path of his ADEA claim, the sole basis of subject-matter jurisdiction alleged or apparent from the face of the amended complaint. Accordingly, the Court must conclude that plaintiff's federal law cause of action is frivolous and devoid of merit. Defendant's Motion to Dismiss should therefore be granted.

For the reasons stated, this cause is dismissed and the Clerk is directed to enter a final judgment accordingly.

IT IS SO ORDERED.

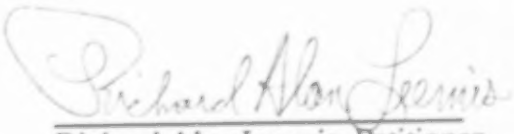
ENTER: This 7th day of April, 1989.

s/s Robert M. McRae
ROBERT M. McRAE
SENIOR UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of March, 1989 served forty copies of the foregoing WRIT OF CERTIORARI upon the party indicated below by placing same in the United States mail, postage prepaid, addressed as follows:

Clerk, Supreme Court of the United States
One F Street, N.E.
Washington, D.C. 22303



Richard Alan Leemis, Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of March, 1989 served three copies of the foregoing WRIT OF CERTIORARI upon the party indicated below by placing same in the United States mail, postage prepaid, addressed as follows:

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Richard Alan Leemis

Richard Alan Leemis, Petitioner

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No. 88-1565

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD ALAN LEEMIS,

Petitioner,

v.

HOSPITAL CORPORATION OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT,
HOSPITAL CORPORATION OF AMERICA

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a 32-year old plaintiff is within the class of persons protected by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634, despite the express provision contained in 29 U.S.C. § 631(a) that the application of the Act "shall be limited to individuals who are at least 40 years of age."

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit appear in the caption of the case in this Court.*

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* Pursuant to Supreme Court Rule 28.1, Hospital Corporation of America has no parent corporation, subsidiaries (except wholly-owned subsidiaries) or affiliates.

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No. 88-1565

IN THE

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RICHARD ALAN LEEMIS,

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HOSPITAL CORPORATION OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Hospital Corporation of America respectfully urges denial of the Petition for a Writ of Certiorari to review the judgment and order entered by

the United States Court of Appeals for the Sixth Circuit on November 21, 1988.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

This case arises under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634. 29 U.S.C. § 631(a) provides that:

> The prohibitions in this chapter (except the provisions of section 623(g) of this title) shall be limited to individuals who are at least 40 years of age.

STATEMENT OF THE CASE

A. Statement of Facts

On January 14, 1987, Richard A. Leemis, at the time a 32-year old Process

Development Analyst, was terminated from his employment with Hospital Corporation of America ("HCA"). On September 25, 1987, Leemis filed a charge of discrimination with the Tennessee Human Rights Commission and the Equal Employment Opportunity Commission ("EEOC"), alleging that his employment had been terminated due to his age in violation of the Age Discrimination in Employment Act ("ADEA"). On December 21, 1987, the EEOC dismissed the charge for lack of standing.

B. The Course of Proceedings And Disposition In The Courts Below

On January 29, 1988, Leemis filed a complaint in the United States District Court for the Western District of Tennessee, Western Division, asserting that HCA had wrongfully discharged him, breached his employment agreement,

inflicted emotional distress upon him, defamed him, interfered with his prospective economic advantages and misrepresented material facts to him. On February 23, 1988, HCA filed a motion to dismiss the complaint for lack of subject matter jurisdiction. Leemis then amended his Complaint to add a count specifically alleging that he had been discriminated against on the basis of his age in violation of the ADEA. HCA thereafter renewed its motion to dismiss, noting that Leemis was only 32-years old and therefore not covered by the ADEA.

In an order dated April 7, 1988, the District Court dismissed both the original and the amended complaints for lack of subject matter jurisdiction. As the ADEA claim was the sole basis for invoking the District Court's jurisdiction, no subject

matter jurisdiction existed since Leemis' age rendered his federal cause of action baseless. On November 21, 1988, the United States Court of Appeals for the Sixth Circuit affirmed.

REASONS FOR DENYING THE WRIT

Consideration of the question raised by the Petition is wholly unwarranted. No conflict of any sort exists among the courts, nor is any significant question of federal law involved. Rather, the legislature has unequivocally declared in the statute itself that persons less than forty years old are not covered by the ADEA except in certain limited circumstances not pertinent here. The Courts below simply applied the unambiguous language set forth in the Act in the same

manner as every other court faced with the issue.

Employees under forty claiming to have been discriminated against because of their age have no viable claim under the ADEA. Crane v. Schneider, 635 F. Supp. 1430, 1434 (E.D.N.Y. 1986); Kodish v. United Airlines, Inc., 463 F. Supp. 1245, 1249 (D. Colo. 1979), aff'd, 628 F.2d 1301 (10th Cir. 1980). Only individuals who are 40 years of age or older can pursue a substantive claim of age discrimination. Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985); Settino v. City of Chicago, 642 F. Supp. 755 (N.D. Ill. 1986).

The sole decision relied on by Leemis in support of his position that coverage under the ADEA should be extended to persons of all ages, Merkel v. Scovill,

Inc., 787 F.2d 174 (6th Cir.), cert. denied, 479 U.S. 990 (1986), arose under Section 4(d) of the Act, 29 U.S.C. §§ 623(d), prohibiting an employer from discriminating "against any of his employees . . . because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." The plaintiff in Merkel claimed to have been discharged in retaliation for refusing to execute an affidavit in conjunction with the employer's investigation of an age discrimination charge filed by another employee. As he had failed to demonstrate that his employer knew or had reason to believe that the proposed affidavit was false, the Court entered judgment in favor

of the employer on the ADEA claim and did not address the applicability of Section 4(d) to individuals under the age of forty. Regardless of whether the anti-retaliation provisions of the Act apply to persons less than forty years old, however, the substantive provisions plainly do not, and Leemis has no cognizable claim.

The legislature has determined that only those persons over the age of 40 are entitled to protection against discrimination on account of their age under the ADEA, and Leemis is not within the protected group. He has no actionable age discrimination claim, and the Courts below properly dismissed his complaint. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT,
HOSPITAL CORPORATION
OF AMERICA

opinion of these courts on this matter. The age of the Plaintiff in Merkel was simply not an issue of law. The ADEA statutes on this matter were perfectly clear to the Merkel court.

Neither the Honorable District Court Judge nor the Appellate Court addressed themselves to the importance of the Merkel decision in their orders.

III

The Respondent cites the cases of Crane v. Schneider, 635 F.Supp 1430 (E.D. N.Y. 1986); Kodish v. United Airlines, Inc., 436 F.Supp. 1245 (D. Colo. 1979), aff'd. 628 F.2d 1301 (10th Cir. 1980); Hahn v. City of Buffalo, 770 F.2d 12 (2nd Cir. 1985); Settino v. City of Chicago, 642 F.Supp. 755 (N.D. Ill, 1986). In all of these case, the Plaintiffs challenged the applicability of the ADEA Section 12 limitation [29 U.S.C. §631] to their particular cases. All of the Plaintiffs were under the age of 40 and all of the decisions went against the Plaintiffs. These cases are distinguishable from this one in that none of the Plaintiffs alleged an evasion or subterfuge to the law nor did the Plaintiffs claim that the Defendants took action prohibited by paragraphs (a)(3), (c)(3)

Supreme Court, U.S.
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No. 88-1565

IN THE
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RICHARD ALAN LEEMIS

Petitioner,

vs.

HOSPITAL CORPORATION OF AMERICA (HCA),

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI REASONS FOR GRANTING THE WRIT

This reply brief is submitted to respond to arguments first raised by the Respondent in their Brief in Opposition and to correct certain inaccuracies and misstatements contained therein.

I

The Petitioner and Respondent are now in substantial agreement on several essential elements of this case. Contrary to its previous position expressed in its Appellate Brief, the Respondent now concedes that it is possible for a Plaintiff under the age of 40 years to properly state a claim for relief under the ADEA (Brief of the Respondent in Opposition to Petition for Writ of Certiorari, p.5). Although the Respondent states its belief that this fact is not relevant to this case, the Respondent and the Petitioner are now in substantial agreement as to the meaning of the applicable statutes [29 U.S.C. §623 (a)(3), (c)(3), (d)].

The Respondent's and Petitioner's reading of the statutes are clearly opposite that of the Honorable District Court Judge.

II

Contrary to its previous contention that Merkel v. Scovill, [573 F. Supp. 1055, 787 F.2d 174 (6th Cir. 1986)] involved only state claims, the Respondent now takes the position that the Plaintiff Merkel did state a cognizable claim under the ADEA (Brief of the Respondent in Opposition to Petition for Writ of Certiorari, pp. 6-7). Plaintiff Merkel was thirty years old at the time [573 F.Supp. 1055, 1058].

Although the Respondent believes that the decision for the Defendant was significant, the Petitioner disagrees. What is significant about the Merkel case is that a thirty-year-old ADEA plaintiff was twice allowed by Federal courts to proceed with a properly stated claim for age discrimination. The age of the Plaintiff was never an issue of law nor did the age of the Plaintiff influence in any way the decision of the Court. The fact that the Court did not specifically address the issue of the Plaintiff's age speaks volumes concerning the

or (d) of Section 4 of the ADEA [29 U.S.C. §623]. In cases where an evasion of the ADEA has been an issue, the Courts have supported an examination of the Defendant's motivations. [See Wolf v. J. I. Case Co., 617 F.Supp. 858 (D.C. Wis. 1985) and Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985).]

Although the Petitioner has specifically alleged that the Respondent, HCA, was engaged in an evasive scheme to undermine the ADEA, the lower courts have refused to undertake an examination of the motivations of the Respondent.

IV

The Respondent, HCA, states that it is the intent of the Petitioner "...that coverage under the ADEA should be extended to persons of all ages..." (Brief of the Respondent in Opposition to Petition for Writ of Certiorari, p. 6). This issue is a diversionary invention of the Respondent. The Petitioner has not challenged the Section 12 [29 U.S.C. §631(a)] limitation on age. The respondent previously acknowledged the Section 12 limitation does not apply to all

prohibitions of Section 4 [29 U.S.C. §623]. (See Brief of the Respondent in Opposition to Petition for Writ of Certiorari, p. 5). The Respondents position on this issue is inconsistent. The respondent changes direction on this issue several times in their brief. The Petitioner has never sought to challenge the age limitation set out in Section 12 of the ADEA.

V

The Respondent, HCA, attempts to show that the Petitioner's claim is invalid because the claim falls under the "substantive provisions" of the Act rather than the "anti-retaliation provisions of the Act" (Brief of the Respondent in Opposition to Petition for Writ of Certiorari, p. 8). The words "cover up," "scheme," and "subterfuge" have been used repeatedly by the Petitioner to describe the actions of the Respondent [see EEOC Complaint and Motion to File Amended Complaint]. The text of the Act [Cong.Rec., Pg. 31248-57] shows that Section 4 of the Act [29 U.S.C. §623] is headed by the title, "Prohibition of Age Discrimination." All of the Acts prohibitions are contained in Section 4. Any claim of "Age Discrimination" or any reference to

"prohibitions under the ADEA" automatically would refer to all relevant paragraphs of Section 4. An attempt to characterize some of the Section 4 prohibitions as exclusively substantive or exclusively anti-retaliatory is academic. All paragraphs of Section 4 clearly prohibit age discrimination and would apply circumstantially to any legitimate claim thereof.

VI

The Honorable Robert M. McRae, Senior U. S. District Judge was clearly in error in dismissing the Petitioner's Complaint. In his Order of Dismissal (see Petition for a Writ of Certiorari - Appendix B), the Honorable Judge justifies his order on the sole basis of the Plaintiff's age:

> "Plaintiff's age places an inescapable barrier in the path of his ADEA claim..." (p. 4)
>
> "The ADEA protects only those individuals who are at least forty years of age." (p. 3)

In that both the Petitioner and Respondent have stated their belief that there are circumstances under which persons under 40 years of age are covered by the prohibitions of Section 4 of the ADEA [29 U.S.C. §623] the Judges

exclusive use of age as an absolute bar to District Court jurisdiction cannot stand.

The Petitioner has specifically alleged a violation of the ADEA statutes citing Section 4 (a)(3) [29 U.S.C. §623(a)(3)]. The Petitioner also alleged a pretextural motivation to the termination that would constitute a subterfuge to the Federal law.

The failure of the lower courts to consider past Court cases relevant to a transparent evasion of the Act [see Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978) and Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985)] is reason enough to grant the writ. The lower courts failed to resolve every doubt on behalf of the Plaintiff [see Jenkins v. McKeithen, 395 U. S. 411, 421-422 (1969)]. This Court's consideration of this matter is wholly warranted.

VII

Conclusion

For the reasons stated above as well as those stated in the Petition for Certiorari, Petitioner requests that the Petition for Certiorari be granted.

Respectfully submitted,

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Dated April 1989